91-51

Supreme Court, U.S.
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CASE NO._____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Robert Hall, Petitioner-Plaintiff vs. New York State Department of Environmental Conservation, ET AL Respondent-defendants	ON APPEAL FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT APPEAL 90-7765

PETITION FOR WRIT OF CERTIORARI

Robert Hall
Appearing Pro Se
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45 pgs.

QUESTION PRESENTED

Whether officials of the New York State Department of Environmental Conservation hereafter NYSDEC who have over several years created and aggravated racial discrimination in employment against plaintiff because plaintiff is black; through racially biased terms and conditions of employment; must take all possible steps to eliminate the discriminary terms and conditions of employment and return plaintiff to where he would have been if the discrimination had not taken place. And whether, based on the record and law, the order granting the defendants' summary judgment motion should be overturned , thus sending this case to trial.

LIST OF ALL PARTIES

ROBERT HALL

PETITIONER-PLAINTIFF

V

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,THOMAS C. JORLING,EDWARD O. SULLIVAN,FRANCISCO LOPEZ,WILMA DELUCCO,JOHN W. PRINTUP,MICHAEL J. O'TOOLE,JR.,JOHN J. WILSON,PAUL R. COUNTERMAN,JOSEPH L. SLACK,ROBERT L. COLLIN,CHARLES S. HAUGH,GERALD J. RIDER,RAYMOND E. LUPE,SEVUSGAW CHETTY

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HALL,PETITIONER

V

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,ET AL

PETITION FOR WRIT OF CERTIORARI FROM COURT OF APPEALS SECOND CIRCUIT

To the Honorable,the the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Hall, the petitioner herein, prays that a writ of certiorari issued to review the judgment of the court of Appeals for the second circuit entered in the above entitled case on january 3, 1991.

OPINIONS BELOW

The opion of the court of Appeals for the second circuit is unreported and is printed in Appendix A hereto, infra,page 36 . The summary judgment of U.S. District Court Northern District of New York is printed in Appendix A hereto, infra, page 26 . The decision on the motion to rehear is printed

in Appendix A hereto, infra, page 24 .

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit(Appendix A, infra, page 36) was entered on January 3,1991. A request for a petition for rehearing was denied on April 2, 1991, (Appendix A, infra, page 24). 28U.S.C.$372(c) complaints for prejudice was put in against Judges Meskill,Pratt and Walker of the Court of Appeals for the Second Circuit and against Magistrate Smith who was the trial judge by the plaintiff Robert Hall. A summary judgment order that dismissed the plaintiff's case was enterde by Magistrate Smith on August 15,1990. The jurisdiction of the Supreme Court is invoked under 28U.S.C. $210(c) that the writ of certiorari shall be "applied for within ninety days after the entry of such judgment or decree," for civil cases from state or federal courts. Jurisdiction is also invoked under 28U.S.C. $1254.

STATUTE INVOLVED

This case involves the first section of the Fourteenth Amendment to the constitution of the United States,which provides as follow: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of liberty or property,without due process of law; nor deny to any person within its juisdiction the equal protection of the laws.

STATEMENT OF CASE

The trial magistrate denied plaintiff's Motion for Default Judgment against the defendants and granted the defendants' Motion for Summary Judgment against the plaintiff because he was biased against the plaintiff. The Court of Appeals' Judges reaffirmed the trail magistrate's decision because they were biased against plaintiff. The record clearly shows that on numerous occassions the plaintiff applied for positions that he was qualified for and was rejected for these positions. The reasons that the defendants

claim for rejecting the plaintiff for these positions were subjective and the real reason for plaintiff's rejection was his race. The record clearly shows that plaintiff was subjected to racial harassment by his white co-workers and when plaintiff complained to various levels of management about this racially motivated harassment he was ignored. The record clearly shows that the plaintiff was given inaccurate,fabricated and racially motivated performance evaluations by the defendants. The record clearly shows that the plaintiff was given an assignment to study the safety of the Love Canal sludge tanks and when the plaintiff completed his assignment and raised safety issues concerning a fire and dioxan release from these tanks in an urban environment and after the plaintiff put in a racial discrimination complaint against the defendents the defendants then retaliated against the plaintiff. The record clearly shows that the defendants fabricated allegations against the plaintiff. The record

clearly shows that the plaintiff worked in a racially hostile environment and the defendants acted in a racist and bigoted ways against the plaintiff. The record clearly shows that the defendant NYSDEC has a pattern and practice of subjecting its' black employees to racial discrimination which results in the low (2%) percentage of blacks that work for the defendant NYSDEC. The record clearly shows that a high percentage of black employes receive low performance rating and a majority of whites receive highly effective performance rating due to race.

PRELIMINARY STATEMENT

Plaintiff, Robert Hall, submits this brief in opposition to Magistrate Smith's order and the Court of appeals order granting defendant's Motion for Summary Judgment seeking a dismissal of the complaint. The defendants are not entitled to judgment as a matter of law. There exits disputes of material facts sufficient to warrant a trail

on this matter.

PROCEDURAL HISTORY

On or about June 26, 1989, Plaintiff, Pro Se, commenced this action in the Northern District of New York after receiving a right to sue letter from the U.S. Equal Employment Opportunity Commission. This lawsuit was based on discrimination by the defendants against the plaintiff due to his race and color in violation of Title VII of the Civil Rights Act of 1964 as amended in 1972, 42 USC Sections 1981, 1983, Fourteenth Amendment of the United States Constitution and 75-b of the civil service laws with forbids state supervisors from retaliating against state employees when state employees raise safety issues with government officials.

Plaintiff seeks a permanent injunction in the form of court control of NYSDEC,paid leave time, compensatory damages totaling $2,000,000.00 and punitive damages totaling $5,000,000.00.

FACTS AND ARGUMENTS

Gerald Rider became plaintiff's supervisor on or about April 1, 1987. Gerald Rider gave plaintiff a racially discriminatory probationary performance evaluation,(Rider's EBT Exhibit A, Hall EBT 268-271, Hall's Affidavit Exhibits 4,34 and 73). Robert Hall was subjected to constant racial harassment by white co-workers and supervisors. (Hall EBT 275-278,322, plaintiff's Exhibit 47,57,58 59,60,61,62, Rider EBT Exhibit H and O Hall's Affidavit). Robert Hall applied for a position with Sev Chetty on March 14, 1988. Robert Hall was denied the position by Mr. Chetty, an Indian national, and Mr. Counterman, a white male, because Robert Hall is black (Hall's Affidavit,Hall EBT 161-164). Mr. Chetty wanted Indians or whites in his section; three of the employees working in Mr. Chetty's section are persons born in India just like Mr. Chetty (Chetty Interogatory Response). Mr. Chetty did not hire Robert Hall and the person he eventually

hire was also a person born in India. Chetty's reasons for not hiring Robert Hall were pretextual in the fact that there are only 65 Asian Americans out of 2928 persons (about 2.7%) that work for NYSDEC and he has about fifty percent of his staff that are Indian.

Robert Hall filed an affirmative action office complaint with Frank Lopez on June 3, 1988. This complaint documents racial harassment against Robert by Gerald Rider, Nancy Ouderkirk and Scott Foti who worked for Joseph Slack. Frank Lopez refused to take appropriate actions to stop the racialharassment against Robert Hall by white employees of NYSDEC.

The NYSDEC has only 72 black employees out of a total of 2928 employees or only about 2.4% (Plaintiff's Exhibit 44). This is because there is a pattern and practice at NYSDEC to discriminate against its' black employees. Robert Hall was assigned the task to

investigate the safety of the Love canal sluge tanks. Mr Hall sent a letter to the agency's Health and Safety Director after Mr. Rider put in the monthly report that the tanks are safe even though Robert Hall said the tanks are unsafe on August 24 1988. Mr. Rider retaliated against Robert Hall for both the affirmative action complaint and Robert Hall's letter to the Health and Safety Director by sending a November 10, 1988 counseling memorandum to Robert Hall stating that Robert Hall's performance was non-effective.

POINT 1

PLAINTIFF DEMONSTRATES THAT DEFENDANTS INTENTIONALLY DISCRIMINATED AGAINST HIM WITH MALICE BECAUSE OF HIS RACE AND COLOR

The well known rule for the shifting of burdens of proof for discrimination cases is stated in Texas Department of Community Affairs v. Burdine, 450 US 248 (1981). Once a plaintiff establishes his prime facie case, the burden shifts to defendant to show

that the reason for the challenged action was due to some legitimate, non-discriminating purpose. If defendant makes such a showing through introduction of admissible evidence the burden then shifts back to plaintiff to prove by a preponderence of evidence, that the reasons offered were, in reality, a pretext for discrimination.

As discussed above, the record overwhelmingly establishes Robert Hall was compelled to function in a hostile work environment. The plaintiff was also subjected to a method of performance evaluations and the application of work rules not utilized with other employees. Futhermore, the general attitude of most of Robert Hall's supervisors clearly supports a level of animosity not displayed by them to others.

In Demedina v Preinhart,686 F.2d 997(1982), the Court of Appeals for the District of Columbia held that when plaintiff submits sufficient evidence to permit an inference that the defendant employer is treating some

people less favorable than others because of their race,color,religion,sex or national origin,Title VII gives it the status of a legal mandatory,rebuttable presumption. Consequently, the granting of defendant's Motion for Summary Judgement would not be appropriate.

Additionally, several other questions of fact should be solved by the trier of fact. Defendants repeatedly argue that all actions taken against the plaintiff were motivated by legitimate, nondiscriminatory business reasons. Even if the defendant can prove this, as held in Burdine, supra, the plaintiff would still have an opportunity to prove by a preponderence of the evidence that the reasons offered were, in reality, a pretext for discrimination. Futhermore, a question of fact exists as to whether some of the defendants' actions constituted retaliatory discrimination.

The Federal District Court for the Southern District of New York held in Ganguly v. New

York State Department of Mental Health Dunlap Manhattan Pyschiatric Center, 92 FR, 125 (1981) that in an employment discrimination suit in which plaintiff raises claims of retaliatory discrimination, intent or motive is an essential ingredient of plaintiff's proof of discrimination, and thus summary judgement is ordinarily inappropriate. See also, Byrd v. Roadway Express, Inc., 87 f.2d 85 (5th Cir. 1982), Wormack v. Shell Chemical Co., 514 f. Supp. 1062 (D. Ala. 1981).

POINT 2

THE RECORD CLEARLY SHOWS THAT PLAINTIFF WAS SUBJECTED TO INTENTIONAL DISCRIMINATION AND THAT SUMMARY JUDGEMENT IS NOT APPROPRIATE IN THIS INSTANCE BECAUSE OF THE QUESTION OF MOTIVE AND INTENT

Summary judgement should be used cautiously in employment discrimination casses and all procedural requirements must be given strict adherence. Fed. Rules Civ. Pro Rule 56, 28 USCA. In considering a motion for summary judgement in an employment discrimination

case, court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available in order to determine whether invidious discriminatory purpose was a motivating factor. Fed. Rules Civ. Pro. Rule 56, 28 USCA.

The Court is cognizant that summary judgement is "especially questionable" in employment discrimination cases, because such cases necessarily involve examining motive and intent. Summary judgement should be used cautiosly in such cases and all procedural requirements must be given strict adherence. See Bullard v. OMI Georgia, Inc. 640 F.2d 632, 633-634 (5th Cir. 1981);Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 997 (5th Cir. 1979). The Fifth Circuit has been partticularly cautioned against summary disposition "on a potentially inadequate factual presentation" Hayden v. First National Bank of Mt. Pleasant.

Futhermore, in considering a motion for summary judgement in an employment

discrimination case such as this, the court must fully heed the admonition of the Supreme Court in Arlington Heights v. Metropolitan Housing Development Corp., 429 US 252, 266 97 S.CT. 555,564, 50 L.ED2d 450 (1977): Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

POINT 3

THE DEFENDANTS SUBJECTED THE PLAINTIFF TO RACIAL DISCRIMINATION WITH MALICE

Jack Lauber told the plaintiff that the defendant Michael O' Toole was going to see to it that he did not pass his probation for his senior sanitary enginer position, even before plaintiff started this new position, (Plaintiff's Exhibit 36). That Edward Sullivan in a memo to plaintiff informed plaintiff that if he felt his performance evaluation was discriminatory he should go to the Division Director O' Toole (Plaintiff's

Exhibit 5). Michael O'Toole in reality was instructing the plaintiff's supervisors to give him an unsatisfactory evaluation (Hall's Affidavit). The record will show that the following defendants conspired to fabricate sexual harassment charges against the plaintiff to emotionally destroy him and get him terminated from his state position: Gerald Rider, John Willson, Michael O'Toole, Edward Sullivan, Wilma Delucco, Frank Lopez, John Printup and Thomas Jorling.

POINT 4

THE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT SHOULD BE DISMISSED BECAUSE IN A SIMILAR CASE AGAINST NYSDEC THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS DISMISSED

Barbara Johnson, a black employee of NYSDEC, filed a racial discrimination action against NYSDEC in February 1986 (Plaintiff's Exhibit 40 and 75). This was an employment discrimination action based on race. The defendants' Motion for Summary Judgement was dismissed (Plaintiff's Exhibit 75). Barbara

Johnson alleged that she was subjected to racial harassment. Victor Paladino told plaintiff that the state settled with Barbara Johnson (Hall's Affidavit)

Civil Service Law 75-b is relevant to this case because the plaintiff was retaliated against for raising a safety issue with NYSDEC management and it should be used to make plaintiff whole again, $75-b is for retaliatory actions by public employers when an employee raises a safety issue to a government body. The plaintiff's career was ruined by these retaliatory actions. The plaintiff would have been in an associate sanitary engineer position if this retaliation had not happened; thus plaintiff has suffered monetary loss due to this retaliation. Plaintiff has had to use vacation, personal and sick leave to deal with the effects of this retaliation. This time would not have been used if this retaliation had not happened; thus plaintiff has suffered a loss of leave credits. This

retaliation amounts to malice on the part of the defendants(Hall's Affidavit).

REASON FOR GRANTING WRIT

Certiorari should be granted because the lower court judges were biased against plaintiff.

The record clearly shows that plaintiff's case should have been allowed to go to trial. Plaintiff has put in a U.S.C. 28 $372(c) complaint against the three Court of Appeals Judges and the trial Majistrate due to racial bias. Summary Judgment was not appropriate based on the record for the plaintiff's case. The court is cognizant that Summary Judgment is "especially questionable" in employment discrimination cases, because such cases necessarily involved examining motive and intent. Summary Judgment should be used cautiously in such cases and all procedural requirements must be given strict adherence. See Bullard v. OMI Georgia, Inc. 640 f.2d 632,633-634 (5th Cir. 1981); Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994;

997 (5th Cir. 1979).

The appeal record shows that that the NYSDEC, which had only two percent black employment, gave whites significantly higher performance ratings than blacks and other minorities. The record clearly shows that the NYSDEC Division Director intentionally discriminated against plaintiff by preventing him from changing positions. The record clearly shows that the plaintiff was given racially motivated fabricated performance evaluations by defendants. On page 25 of appeal The Federal District Court for the Southern District of New York held in Ganguly v. New York State Department of Mental Health - Dunlap Manhattan Psychiatric Center, 92 FRD 125 (1981) that in an employment discrimination suit in which plaintiff raises claims of retaliatory discrimination, intent or motive is an essential ingredient of plaintiff's proof of discrimination, and thus Summary Judgment is ordinarily inappropriate. See also Byrd v. Roadway Express Inc., 87

F.2d 85 (5th Cir., 1982); Wormack v. Shell Chemical Co. 514 F. Supp. 1062 (d. Ala. 1981).

The record shows that plaintiff applied for positions, was qualified, but the persons hiring rejected plaintiff in order to hire someone of his own race and color.

The Second Circuit's decision in this case is contrary to the record,is contrary to law and is contrary to the Fifth Circuit's decisions and is contrary to a Southern District of New York decision. Finally when you have obtained records from the defendants that state that over sixty percent of white employees of plaintiff's division receive highly effective rating for their performance evaluations and over sixty percent of blacks get effective or lower on their performance evaluations it is clear NYSDEC discriminates against the plaintiff and other blacks.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully Submitted,

Robert Hall

Robert Hall

Pro Se

429 Brandywine Ave.

Schenectady, N.Y. 12308

June 24, , 1991

CASE NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1991

Robert Hall
petitioner-plaintiff

vs.

New York State Department of
Environmental Conservation, ET AL.
respondent-defendants

ON APPEAL FROM COURT OF

APPEALS FOR THE SECOND CIRCUIT

Appeal 90-7765

APPENDIX OF

PETITION FOR WRIT OF CERTIORARI

Robert Hall
Appearing ProSe
429 Brandywine Ave.
Schenectady, N.Y.
12308

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

filed
April 2, 1991

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Second day of April, one thousand nine hundred and ninety-one.

HALL V. NYSDEC

DOCKET NO. 90-7765

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Robert Hall, Appellant, pro se,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith

Clerk

UNITED STATES DISTRICT COURT filed
NORTHERN DISTRICT OF NEW YORK Aug.15,1990

ROBERT HALL,

Plaintiff,

vs. Civil No. 89-CV-805

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al.,

Defendants .

RALPH W. SMITH, JR.
United States Magistrate

MEMORANDUM-DECISION AND ORDER

This matter was referred to the undersigned by the Honorable Thomas J. McAvoy pursuant to 28 U.S.C. §636(c) upon the consent of the parties to have the undersigned conduct all proceedings in this case, including ordering an entry of final judgment.

Plaintiff, an employee of the New York State Department of Environmental Conservation (DEC), filed this pro se civil rights action pursuant to 42 U.S.C. §§ 1981,1983 and 200e et seq. (Title VII of the Civil Rights Act of 1964) alleging that, throughout

his employment with the DEC, the defendants have repeatedly and continuously discriminated against him because he is black. He claims that he was improperly denied numerous positions and/or promotions, that he was improperly "demoted" from the position of Senior Sanitary Engineer, that he was conspired against and subjected to fabricated sexual harassment charges, and that he has been the victim of various forms of racially motivated harassment and retaliation.

Plaintiff seekd both monetary and injunctive relief. This case is presently before the Court upon defendants' motion for summary judgment.

SUMMARY JUDGMENT

A party moving for summary judgment must demostrate the absence of a genuine issue of material fact. Fed.R.Civ. P. 56(c);Project Relief v. Prevost, 722 F. 2d 960,968 (2d Cir. 1983). When deciding a motion for summary judgment, all ambiguities or inferences must

be construed in favor of the non-moving party. Id. However, if the moving party has met the requirements of Rule 56(c)[1], the opposing party may not rely on mere conclusory allegations or denials, but rather "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P.56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248(1986). Once the moving party carries its initial burden, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249. In order to avoid summary judgment in an employment discrimination case, a plaintiff must "show that sufficient evidence exists in the record to support a reasonable finding of discrimination." Gibson v. American Broadcasting Companies, Inc. 892 F.2d 1128, 1132(2dCir.1989).

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[1]Rule 56(c) provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadins, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law."

EMPLOYMENT DISCRIMINATION

Plaintiff claims that he has been denied numerous positions and/or promotions because he is black. The elements of a cause of action for employment discrimination are well settled in the Second Circuit:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."...Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Meiri v. Dacon, 759 F.2d 989,994 (2d Cir.), cert. denied, 474 U.S. 829 (1985)(citations omitted).

In order to establish a prima facie case of employment discrimination, a plaintiff must show that:

> (1) he or she is a member of a statutorily protected class; (2) he or she is qualified for the position applied for; (3) the employer denied plaintiff the job sought; and (4) after such denial the employer continued to seek applicants for the position with qualifications similar to plaintiff's.

Gibson, 892 F.2d at 1131 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792,802 (1973)).

Assuming arguendo, that plaintiff has established his prima facie case,[2] the next inquiry is whether the defendants can offer legitimate, non-discriminatory reasons for denying plaintiff the positions and/or promotions in question. In order to satisfy this burden, the defendants' "explanation of [thier] reasons must be clear and specific....Were vague or conclusory averments or good faith

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[2]For purposes of this motion the Court will assume that plaintiff has satisfied the requirements of his prima facie case. However, it is doubtful that such a finding would result from a hearing on the merits.

sufficient...,Title VII employees seeking to demonstrate pretext would be unfairly handicapped." Meiri, 759 F2d at 997(citations omitted). The defendants have met their burden clearly and convincingly. Their motion for summary judgment is supported by a veritable mountain of documents[3] which demonstrate, beyond doubt, that plaintiff's claims are so lacking in merit as to be frivolous. It is apparent that, rather than discriminating against plaintiff, the defendants have treated him fairly and with restraint despite his estremely confrontational[4] and litigious[5] personality.

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[3]Defendants have submitted a 71-page memorandum of law, 92 exhibits, 12 affidavits, and the 480-page deposition of Mr. Hall in support of their motion.

[4]Plaintiff has demonstrated a striking inability to get along with or deal effectively with his co-workers, a problem which the Second Circuit has held "represents a legitimate, nondiscriminatory reason for an employment decision." Meiri, 759 F2d at 997 (citations omitted).

[5]In the past 18 months, plaintiff has filed 17 complaints with the DEC Affirmative Action office in addition to two lawsuits in the Northern District. Most, if not all, of his complaints have been completely frivolous and unsubstantiated.

THE DEMOTION

Plaintiff's claim that he was "demoted" from the position of Senior Sanitary Engineer to Assistant Sanitary Engineer exemplifies the frivolity of this lawsuit. Mr. Hall was hired by the DEC as an Assitant Sanitary Engineer in February 1986. On June 12 of that year, he was conditionally promoted to Senior Sanitary Engineer. In order to remain in that position he was required to obtain a New York State Professional Engineering license within one year of his promotion. Plaintiff took the licensing exam, which is administered on a semi-annual basis, in April 1987, but failed. In June 1987, as a result of his failure to meet the licensing requirement, plaintiff was reverted back to his old position.

Although he admits that he was aware of the licensing requirement at the time he applied for the promotion, plaintiff main-

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Plaintiff appears to blame virtually every disappointment in his life on racial discrimination, dating back at least as far as 1978,when he was expelled from medical school for cheatin. See Hall v. Medical College of Ohio at Toledo, 742 F.2d 299

(6th Cir. 1984), cert. denied,469U.S.1113(1985)

tains that his "demotion" was racially motivated, claiming that whites who fail to meet the licensing requirement are not demoted. Such a claim is wholly conclusory and unsupported by any evidence whatsoever. The Second Circuit has repeatedly held that "complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." Barr v. Abrams, 810 F.2d 358 (2d Cir. 1987) (citations omitted).

In addition, after finally passing the licensing exam on his third attempt, plaintiff was again promoted to the position of Senior Sanitary Engineer. This further undermines his claim that the demotion was racially motivated rather than the result of the

licensing requirement.[6]

Plaintiff's other claims of racially motivated conspiracy, harassment, and retaliation are similarly without merit. Furthermore, in his motion in opposition to defendants' motion for summary judgment, plaintiff has merely reiterated his previous conclusory allegations and alleged, with no supporting evidence, that the legitimate, non-discriminatory reasons put forth by the defendants are purely pretextual. This is insufficient to overcome defendants' properly supported motion for summary judgment.

For the reasons stated above, it is

ORDERED, that defendants' motion for summary judgment be granted and the complaint be dismissed in its entirety.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to lodge written objections to the foregoing report.

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[6]It is noteworthy that plaintiff has not challenged the legitimacy of the licensing requirement.

Such objections shall be filed with the Clerk of the Court with an extra copy to be mailed to the chambers of the undersigned at P.O. Box 1818, Albany, New York 12201-1818. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Small v. Secretary of Health and Human Services, 892 F. 2d 15 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ.P. 72, 6(a),6(e).

DATED: August 14, 1990
Albany, New York

Ralph W. Smith,Jr.
United States
Magistrate

(TJM)

Filed Jan. 3, 1991

NDNY
89-cv-805
McAvoy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of January, one thousand nine hundred and ninety-one.

P r e s e n t:

HONORABLE THOMAS J. MESKILL,

HONORABLE GEORGE C. PRATT,

HONORABLE JOHN M. WALKER

Circuit Judges.

Robert Hall,

Plaintiff-Appellant,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: THOMAS C. JORLING, Commissioner, New York State Department of Environmental Conservation; EDWARD O. SULLIVAN, Deputy Commissioner, New York State Department of Environmental Conservation; FRANCISCO LOPEZ, Deputy Commissioner, Office of Mental Retardation and Developmental Disability, WILMA DELUCCO, Director of Labor

Relations, New York State Department of Environmental Conservation; JOHN W. PRINTUP, Acting Director of Affirmative Action Program, New York State Department of Environmental Conservation; MICHAEL J. O'TOOLE, JR., Division Director of Hazardous Waste Remediation, New York State Department of Environmental Conservation; JOHN J. WILSON, Assistant Division Director of Solid Waste, New York State Department of Environmental Conservation; PAUL R. COUNTERMAN, Bureau Chief of Hazardous Waste Facility Permitting, New York State Department of Environmental Conservation; JOSEPH L. SLACK, Bureau Chief of Eastern Remedial Action, New York State Department of Environmental Conservation; ROBERT L. COLLIN, Section Chief of Great Lakes Division of Water, New York State Department of Environmental Conservation; CHARLES S. HAUGH, JR., Section Chief of Regulatory Assistance Division of Water, New York State Department of Environmental Conservation; GERALD J. RIDER, Section Chief of Special Projects, Bureau of Western Remedial Action, New York State Department of Environmental Conservation; RAYMOND E. LUPE, Section Chief Central Remedial Bureau of Eastern Remedial Action, New York State Department of Environmental Conservation; SEVUSGAW CHETTY, Section Chief, Chemical Technology, A Bureau of Hazardous Waste Facility Permitting, New York State Department of Environmental Conservation.

Defendants-Appellees.

This is a pro se appeal from an order of the United States District Court for the Northern District of New York, Smith, Magistrate, entered on August 15, 1989,

granting summary judgment in favor of defendants and dismissing Robert Hall's complaint in its entirety. Hall had initiated a discrimination action asserting violations of 42 U.S.C. §§ 1981, 1983 and 2000e et seq. Hall also appeals from the Magistrate's order of September 15, 1989, which vacated a default judgment that had been entered against defendants. The case was before the Magistrate for final adjudication pursuant to 28 U.S.C. § 636(c).

This cause came on to be heard on the transcript of record from said district court and was taken on submission.

The judgment of the district court is AFFIRMED.

Initially, we address Hall's challenge to the Magistrate's decision to vacate the default judgment that was entered against defendants on August 1, 1989. Magistrate Smith granted defendants' motion to set aside the entry of default on September 15, 1989. In vacating the default, the Magistrate

acted within his sound discretion. See Marziliano v. Heckler, 728 F.2d 151,156 (2d Cir. 1984) (citations omitted).

Turning to Hall's substantive claims, we conclude that the Magistrate did not err in entering summary judgment. Summary judgment for a defendant is warranted where insufficient evidence exists for a reasonable jury to find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986); see also Gibson v. American Broadcasting Cos.,Inc. 892 F.2d 1128, 1132 (2d Cir. 1989). In his complaint and subsequent pleadings, Hall made only conclusory allegations regarding his assertions of discriminatory treatment. Defendants submitted affidavits and exhibits which offered non-discriminatory explanations for Hall's failure to receive a promotion and for his reduction in grade. Specifically, Hall was "demoted" only because he failed to secure a New York Professional Engineer's license -- a prerequisite for retaining the position of

Senior Sanitary Engineer. A hiring freeze prevented a later reassignment. Thus, the district court properly entered summary judgment as to the Title VII claims, 42 U.S.C. § 2000(e) et seq.

Hall's section 1981 and section 1983 claims were also properly rejected. To state a claim cognizable under section 1981, a plaintiff must allege racial discrimination in the making or enforcement of a contract. Patterson v. McClean Credit Union. 109 S.Ct. 2362, 2374 (1989). Where a potential promotion is at issue, section 1981 only provides a cause of action if the nature of the change in position involves the "opportunity for a new and distinct relation between the employee and the employer," id. at 2377, a situation not present here. In this instance, the distinctions between the position sought, Senior Sanitary Engineer, and the position held, Assistant Senior Engineer, were insufficient to satisfy the standard articulated in Patterson.

Finally, Hall's section 1983 claim also fails as a matter of law. The Supreme Court has held that section 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Will v. Michigan Dep't of State Police, 109 S.Ct. 2304, 2309 (1989). The Eleventh Amendment bars such suits absent a clear waiver of immunity by the state. Id. Section 1983 claims against individuals in their official capacity are also barred. Id. at 2311. To the extent that the officials were sued in their individual capacity, Hall failed to proffer any evidence that would suggest that there were any genuine issues for trial. Therefore, summary judgment was appropriately granted.

Thomas J. Meskill, U.S.C.J.

George C. Pratt, U.S.C.J

John M. Walker, U.S.C J.

N.B.:This summary order will not be published in the federal reporter and should not be cited or otherwise relied upon in unrelated case before this or any other court.